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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 AMTRUST NORTH AMERICA, INC. ET
5 AL.,

6 Plaintiffs,

7 v.

17 CV 5340 (JPO)

8 KF&B, INC.,

9 Defendant.
10 -----x

11 New York, N.Y.
12 May 25, 2018
13 11:00 a.m.

14 Before:

15 HON. J. PAUL OETKEN,

16 District Judge

17 APPEARANCES

18 KASOWITZ BENSON TORRES LLP
19 Attorneys for Plaintiffs AmTrust
20 BY: ALEXANDER SIMKIN MATTHEW J. WEISER

21 LEWIS BRISBOIS BISGAARD & SMITH LLP
22 Attorneys for Defendant KF&B
23 BY: SERENA A. SKALA JOCOB ZISSU

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1 (Case called)

2 MR. SIMKIN: Alexander Simkin, for the plaintiff.

3 MR. WEISER: Matthew Weiser, for the plaintiff.

4 THE COURT: Good morning.

5 MS. SKALA: Good morning, your Honor.

6 Serena Skala, for the defendant.

7 THE COURT: Good morning.

8 MR. ZISSU: Jacob Zissu, supporting Ms. Skala this
9 morning.

10 THE COURT: Good morning.

11 Welcome everybody.

12 We're here to address the letters that the parties
13 have submitted regarding the current disputes on discovery.
14 Before we get to that, let me talk a little bit about the
15 pending motion to dismiss the counterclaims. KF&B has a
16 counterclaim against AmTrust. I've read the briefs and I want
17 to ask a couple of questions about that. Y'all can remain
18 seated for this. You don't need to stand. Just speak into the
19 microphones because we do have a court reporter here.20 As usual in these contract cases, you wish the
21 contracts had been drafted a lot more clearly, and the question
22 is whether there is an exclusive arrangement whether
23 essentially KF&B was made the exclusive broker of AmTrust in
24 the 2013 endorsement, endorsement number two by the language.
25 Producer is appointed as the dedicated program manager. I

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1 think plaintiffs have a pretty good argument that it's kind of
2 an odd way when you've already said that this arrangement is on
3 a nonexclusive basis to then use completely different language
4 that doesn't seem to be a term of art in the industry suddenly
5 you're calling it dedicated. So it seems to me just a better
6 reading contractually probably is that that doesn't trump the
7 nonexclusive language in the main managing producer agreement.

8 However, the question is whether it's unambiguous and
9 I don't know that it's unambiguous. What else does that
10 language mean, "the dedicated program manager" if not it's
11 dedicate in the way that a bike lane is dedicated? It's the
12 sole, it's exclusive. That's one meaning of dedicated.

13 So how would you respond to that?

14 MR. SIMKIN: First, I would say I appreciate what your
15 Honor says about a lot of contract cases having language that
16 you wish was drafted more clearly. I think this contract
17 language is actually drafted as clearly as you could possibly
18 have. When they allege an exclusivity right in the contract,
19 not only is there not an exclusively right, there is actually
20 an expressed provision saying they are appointed on a
21 nonexclusive basis. They then point to a single phrase in an
22 amendment years later that amends a different part of the
23 contract and it is says it's not amending any part of the
24 contract unless it expressly does --

25 THE COURT: What do you mean it "amends a different

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1 part of the contract"?

2 MR. SIMKIN: So, the exclusivity language.

3 THE COURT: It's for AmTrust specialty program
4 section. Isn't that the subject matter of this contract?

5 MR. SIMKIN: The non-exclusivity language is in
6 section, I believe it's 2.1 of the contract.

7 THE COURT: I see what you are saying. This is
8 amending -- it's like an endorsement that amends an amendment
9 to an exhibit.

10 MR. SIMKIN: None of it refers back to that section of
11 the contract.

12 THE COURT: But it's clear in the original contracts
13 that all the endorsements and exhibits become part of the
14 contract. That how these contracts work. There are all these
15 attachments that are just part of the contract.

16 MR. SIMKIN: Sure. But I would say that if the
17 intention is to amend the non-exclusivity language they would
18 say, we're amending that language, but they don't.

19 THE COURT: These things are cobbled together. This
20 is how these contracts work. They say like all the dates are
21 attached to Exhibit A and that's key to the contract. That is
22 the amendment to Exhibit A. These are cobbled together. This
23 is not drafted by casual expenses.

24 MR. SIMKIN: That's true.

25 THE COURT: I assume it was.

15PAAAMTC

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1 MR. SIMKIN: It was not. But I think you had a more
2 specific question which is what does it mean? And the answer
3 is in the next sentence of the contract which is that they are
4 dedicated to bringing all of the taxi business to us and that
5 we have a right of first refusal. And if we don't they go to
6 someone else. That is in the next sentence contract which is
7 the common language meaning of the word dedicated. If I say
8 Mr. Weiser is dedicated to my firm's insurance practice that
9 means he spends all of his time working on the insurance
10 practice. It does mean that he is the only associate who works
11 in the insurance practice. The fact they are the dedicated
12 program manager, I mean they are dedicated to us, not the
13 converse. And there is no language in the contract that says
14 the converse.

15 THE COURT: That's a fair point.

16 Ms. Skala or Ms. Zissu, what's your response to the
17 argument that the little two after little one in the language
18 we're talking about of endorsement two seems to cut in their
19 favor? In other words, it seems to if you read it in context
20 right after saying the "dedicated program manager" it goes on
21 to say it will submit all of the subject business to AmTrust
22 meaning this is like Mr. Weiser being the dedicated associate
23 to Mr. Simkin meaning, all his work is for Mr. Simkin and not
24 to one else at the firm.

25 MS. SKALA: Well, I think the fact that they're

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1 separated into discrete paragraphs and that the second one,
2 Roman numeral two, doesn't come as an index to the first one.
3 There are two discrete ideas. They're reciprocal promises to
4 one another, not that the second one modifies or in any way
5 enhances the first.

6 THE COURT: Well, that's a fair point, Mr. Simkin,
7 which is that their reciprocal promises. One is saying the
8 dedicated program managers, this is our dedicated program
9 manager emphasis on the exclusivity to KF&B being the only
10 broker of AmTrust business. Two goes the other way. Two would
11 be and on the other hand, all subject business of KF&B will be
12 dedicated to AmTrust. It's two sides of the same coin. It
13 seems I'm leaning toward the view that it's ambiguous even
14 though I think you have probably a better reading of the
15 argument. I don't know that it's so clear that it's
16 unambiguous.

17 MR. SIMKIN: So what I was saying is I don't know how
18 my client could have drafted clearer contract saying that they
19 are not the exclusive agent. They could express
20 non-exclusivity language. I think what they're saying is there
21 is an isolated word in an amendment to an amendment years later
22 that is not defined. There is not a term of art in the
23 industry. That's not a defined term with capital letters.
24 There is no obligation that flows from that term. Everything
25 that they are say about that exclusivity right are invented

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1 based on those three words and none of them are in there.

2 So even if it's not defined by itself and even if
3 they're separate concepts, which is what I think you are saying
4 that all of the rights they give themselves, it's actually
5 pretty extraordinary because when you look at the briefing and
6 talk about what exclusivity rights they think they have, all
7 things they've listed, they are not the exclusive person or
8 they now say they are the exclusive person for it. They say
9 this flipped that.

10 THE COURT: But isn't there a course of conduct
11 evidence one way or another? One of the things that this makes
12 me want to know is how did the parties act? Did in July 1,
13 2013, when this language went in, did they change how they are
14 doing business? Because if they weren't then they're argument
15 is even stronger. In the way they were drafting the language
16 did one say now you're going to be dedicated to this and here
17 is what we mean by that in an e-mail or something?

18 MR. SIMKIN: Well, you have to look at the allegations
19 that are in the counterclaim. There are no allegations that
20 that happened. So even if they prove every allegation in the
21 their counterclaim --

22 THE COURT: They don't have to prove the alleged
23 drafting history. There is an alleged draft history to assert
24 a contract.

25 MR. SIMKIN: Well, if they are going to allege the

15PAAAMTC

Conference

1 contract is ambiguous and it has a certain meaning, they would
2 need to allege facts that supported that. And the
3 allegations -- and this is an amended contract. We moved to
4 dismiss the original one and they amended in response to the
5 motion to dismiss. So they have had notice of all our
6 arguments and the opportunity to add in all the facts that they
7 think they have.

8 And what they don't allege is that anyone ever told
9 them that this was an exclusivity provision. They don't attach
10 any correspondence and saying this is what was in someone's
11 mind. They rely exclusively on these isolated words in an
12 amendment to an amendment to a contract that has clear
13 expressed non-exclusivity language and then even the amendment
14 says it's not amending anything implicitly. It says "unless
15 expressly modified and herein".

16 THE COURT: Your argument is they could have been
17 clearer ignores the fact that suddenly this language "dedicated
18 program manager" pops into this endorsement and no one's
19 defined it. It's never been used before. And it says it is
20 appointed as the dedicated program. That's new. That wasn't
21 in the party's prior reading. Why wouldn't you add that? It's
22 not to change the status of the parties.

23 MR. SIMKIN: Throughout the entire contract they are
24 referred to by many terms. There is not a single defining
25 term. There are different references to their role and it's

15PAAAMTC Conference

1 not like there were later amendments and this term doesn't pull
2 through later. It's not like all of a sudden in 2013 you start
3 referring to them exclusively as dedicated program manager
4 going forward. That is an isolated term or phrase in a single
5 amendment that has many different descriptive terms none of
6 which provide exclusivity right. This is just a plain English
7 term they were using to describe an arrangement that was not
8 intended to modify the expressed non-exclusivity language in
9 the contract. If that was what they intended, they would have
10 said that.

11 THE COURT: Why do you need paragraph two if you have
12 paragraph one?

13 MR. SIMKIN: Little "I"?

14 THE COURT: Romanette ii.

15 MR. SIMKIN: In my interpretation romanette ii
16 explains what's meant by romanette i.

17 THE COURT: But one has an exception for ii states and
18 ii doesn't. If ii says all subject business will go to AmTrust
19 including -- Washington, what does it mean to say that KF&B is
20 the dedicated program manager for 48 of the 50 states in one?

21 MR. SIMKIN: I think the answer to that is my client
22 wasn't doing business in the other states. They were appointed
23 to work in 48 states and in those 48 states they needed to
24 bring us business.

25 THE COURT: OK. Anything you want to add on this,

15PAAAMTC

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1 Ms. Skala?

2 MS. SKALA: With respect to the exception of the
3 Oregon and Washington or just in general?

4 THE COURT: Just in general.

5 MS. SKALA: What Alex was saying earlier is that KF&B
6 was referred to as -- throughout the MPA and that's a phrase
7 was just another way of referring to KF&B is entirely in my
8 pleading. It's an isolated phrase because it's adding a new
9 relationship between the parties. It's not a synonym for
10 program manager adding an additional requirement that wasn't
11 there before. And I think that your Honor said it earlier that
12 clearly we need discovery to determine what the intent of the
13 parties were here and that a motion to dismiss is premature.

14 THE COURT: OK.

15 MR. SIMKIN: With respect to discovery, it's the same
16 contract that we're fighting over. So we're producing all the
17 drafting history for the contract. That's not the fight that
18 we're having in the discovery world. What we're having is so
19 they allege that there's an exclusivity provision in the
20 contract that we think doesn't exist. And they say all this
21 other business that's done by hiring separate people and hiring
22 separate affiliates violates that exclusivity provision. And
23 these were people who are otherwise not involved in the dispute
24 we have and are doing things that are otherwise not involved.

25 So with respect to documents that relate to the claims

15PAAAMTC

Conference

1 that are in the contract claims like the trafficking history
2 for the contract, they have that. What we've -- and this
3 really opens up a huge amount of discovery and we think is
4 totally improper is a number of reasons including because
5 having terminated the relationship with KF&B, KF&B now works
6 for one of plaintiff's competitors and they're using this as a
7 fishing expedition to try to get information that they can use
8 for business purposes and they have this -- in my view of
9 imagining exclusivity provision but I wanted to make sure that
10 with respect to the drafting history of the contract, all of
11 that's been produced.

12 THE COURT: Let me understand one other thing which is
13 in terms of how the parties' relationship actually worked
14 from -- the first contract was 2011. So from the first period
15 of 2011 to 2013, was KF&B the only broker selling insurance
16 within the taxi world for AmTrust or were there others?

17 MR. SIMKIN: So we've used AmTrust as a defined term
18 to refer to the plaintiffs in this case. There's also a larger
19 parent company, AmTrust Financial Services Incorporated. So
20 with respect to the three plaintiffs they've never been in the
21 taxi business other than with KF&B during the filing period.
22 KF&B wrote all their taxi business. The fact that I say they
23 had a right to do other business didn't mean they did or they
24 didn't.

25 THE COURT: Even after the 2013 claim they didn't?

15PAAAMTC

Conference

1 MR. SIMKIN: No. The amended -- the contract was
2 updated every year. None of them changed the relationship or
3 the practices.

4 THE COURT: So you're saying they didn't -- until the
5 termination of the contract, they didn't sell insurance through
6 any other broker?

7 MR. SIMKIN: That's my understanding with respect to
8 the three plaintiffs. There may have been -- the insurance
9 companies that are affiliated with parent, they may have done a
10 small amount of the taxi work. They allege in their complaint
11 the parent company of -- a new insurance company, Power
12 Insurance Company towards the end of the relationship between
13 the plaintiffs and KF&B and they allege that Power wrote some
14 taxi business and I suspect that's true although, I don't know
15 that for a fact.

16 THE COURT: OK. And did KF&B on the other hand, were
17 they exclusive in the sense that they did this in the taxi
18 world only for AmTrust or did they also do it for others?

19 MR. SIMKIN: I can tell you what the contract says
20 which is they were supposed to bring all business to us whether
21 they --

22 THE COURT: For the whole period?

23 MR. SIMKIN: For the whole period. Well, whether I
24 think under the contract they had a right to bring it to
25 someone else if we turned it down, whether this scenario

15PAAAMTC

Conference

1 happened on their end, they would have to answer.

2 THE COURT: Do you want to answer?

3 MS. SKALA: My understanding is Mr. Simkin is right
4 with respect to KF&B that they worked in the taxi and limousine
5 industry exclusively with AmTrust and that AmTrust declined
6 particular business that they could bring it to someone else.

7 THE COURT: That was the situation for the whole
8 period?

9 MS. SKALA: Yes.

10 THE COURT: And that language in that romanette ii in
11 the second endorsement was also in the earlier agreements?

12 MS. SKALA: I'd have to go back and check but my
13 understanding is that there was -- I can't say for sure. I'd
14 have to go back and look to be honest.

15 THE COURT: Do you all know of anything in the
16 drafting history that sheds light on this question? I assume
17 you would have put in your briefs.

18 MS. SKALA: Only with respect to what my clients told
19 me, I haven't seen any documents yet that I could provide --

20 THE COURT: You haven't either?

21 MR. SIMKIN: I believe there was an e-mail exchange
22 early on at the beginning of the first contract where they
23 asked for an exclusivity right?

24 THE COURT: Who did?

25 MR. SIMKIN: KF&B.

15PAAAMTC

Conference

1 THE COURT: Meaning they wanted to be the exclusive
2 AmTrust broker?

3 MR. SIMKIN: Correct.

4 THE COURT: Was there 2013 correspondence saying now
5 we're giving you this?

6 MR. SIMKIN: Nothing. Nothing that I've soon.

7 THE COURT: Do you know if there was anything like
8 that?

9 MS. SKALA: I believe we submitted them with our
10 opposition to our motion where three discussed this but it
11 wasn't entirely clear. But based on my conversations with my
12 client and his conversations with several AmTrust employees
13 contemporaneous with it, this amendment, that was their
14 understanding.

15 THE COURT: That was their understanding?

16 MS. SKALA: Yes.

17 THE COURT: OK. All right. Well, I didn't mean to
18 get you into a -- or detour. The purpose of this was not to
19 have oral argument on the motion but since I had read it
20 recently I just wanted to air all my questions and I will be
21 ruling on that shortly, not today, unless I change my mind but
22 I think not today. But the purpose of today is really to go
23 over the parties' discovery disputes and I'll start with KF&B's
24 letter of may 9.

25 First dispute, is KF&B is complaining that plaintiffs

15PAAAMTC

Conference

1 haven't stated the basis of the stated objection, is that
2 right?

3 MS. SKALA: You are looking at our letter from May 9.

4 THE COURT: Well, the document production in general
5 sounds like there was this issue of the 240 count files account
6 files and then whatever the random sample of 300 or whatever
7 then by the last letter of my understanding is that defendant
8 has agreed to produce all of the files; is that right?

9 MS. SKALA: To produce all of files.

10 THE COURT: Yes.

11 MS. SKALA: We had discussed that, yes, but in light
12 of the upcoming deadline with Court if we don't get an
13 extension or some sort of narrowing down of what the plaintiff
14 is looking for it's going to take us a substantial amount of
15 time to produce all of the files because of the number of
16 documents that are generated by the search and just what we're
17 required to review before producing it to them.

18 THE COURT: You talked about word search and then
19 account files. Are account files everything irrespective of --
20 or are those different things?

21 MS. SKALA: So, the way that KF&B's underwriting
22 writing are maintained currently is this there is the agency
23 manages images which are -- file and then there are e-mails,
24 both of which compiles those underwriting files which contain
25 the information used by KF&B to quote the policy.

15PAAAMTC

Conference

1 THE COURT: So the e-mails, how would you know e-mail
2 "X" is in file number 122? Does it say that on the e-mail or
3 is it actually in a computer folder or something?

4 MS. SKALA: No. They were archived because KF&B --

5 THE COURT: They changed archived --

6 MS. SKALA: They weren't organized by the account C,
7 account D.

8 THE COURT: They're all --

9 MS. SKALA: So we have to perform a word search to
10 cull documents, put them in these folders to produce them to
11 the plaintiff.

12 THE COURT: Word search to cull the document, so you
13 were basically recreating the files?

14 MS. SKALA: Yeah. I mean for a lack of a better word,
15 yeah. They may exist. It's not as though they don't exist.

16 THE COURT: But they are not in the file?

17 MS. SKALA: No, not a hard file, no.

18 THE COURT: Or a soft file. They're not in a computer
19 folder under the name whatever, correct?

20 MS. SKALA: Correct.

21 THE COURT: But you are able to say these are all the
22 e-mails by custodian, I assume?

23 MS. SKALA: By performing a search for the custodian,
24 yeah, which we've agreed to do. I don't think there's a
25 dispute there.

15PAAAMTC

Conference

1 THE COURT: OK. So you don't have all the -- there
2 are no paper files?

3 MS. SKALA: Correct.

4 THE COURT: So you do have -- is there like a computer
5 file -- putting aside the e-mails like all the policy documents
6 and correspondence with someone, is there a copy of all that
7 stored differently by the policy or by the contract?

8 MR. ZISSU: So it's two parts, your Honor. The agency
9 management tips which are a limited snapshot of the account.
10 It's a full account. Those are labeled electronically and
11 their file name is filed -- for the e-mails and other things
12 that are physically sorted but in no particular order because
13 we literally pulled all the e-mails, agreed upon custodians,
14 those e-mails are being searched by 21 selected terms that we
15 did agree on with counsel.

16 And also with we're using the policy number and the
17 account submission which is like when ever a request for
18 insurance would come in whether it was actually written into a
19 policy or not, that would get a unique identifier too. So for
20 each account there's an associated number of KF&B A numbers.
21 Some of the accounts had more than one policy issued. Some of
22 them had renewals. For each year the policy was written there
23 is a going to be a distinct submission as it was submitted --

24 THE COURT: I see. So what's the status of the
25 parties' understanding or agreement on what universe of the

15PAAAMTC

Conference

1 policy documents -- I don't know if that is the right phrase --
2 will be produced?

3 MR. ZISSU: We intended to produce all the policy
4 documents. I think what we're doing now is because we had to
5 cull everything on this archive that it didn't unpack neatly.

6 THE COURT: You've hired a team of contract attorneys
7 to pull together the relevant documents?

8 MR. ZISSU: Yes.

9 MS. SKALA: Yes, your Honor.

10 THE COURT: Mr. Simkin, is there anything else we need
11 to talk about with respect to that? We'll get to the deadline
12 in a minute.

13 MR. SIMKIN: I still think we have a lack clarity on
14 our side. In our original letter we didn't talk about
15 underwriting files which we had understood they had agreed to
16 produce all of them. And only if their last letter it looked
17 like --

18 THE COURT: It sounds like they are planning to
19 produce them. They're just concerned about the deadline.

20 MR. SIMKIN: So if that's still the case, then I think
21 that's fine with the caveat that we do have the concern that we
22 need the information to be able to tell which documents belong
23 to which underwriting file and what they've done -- originally,
24 they produced a small number of underwriting files in the
25 dozens that looked very complete and then they made two

15PAAAMTC

Conference

1 productions. That was the first and it was 700 documents or
2 so. Then they made a second production of a few thousand
3 documents that are a jumble of loose e-mails. And I can look
4 at an e-mail or look at a document and see which name is on the
5 document in many instances and then try to reverse engineer
6 which file it gets into. But one of the issues in this case
7 is, did they do their job when underwriting this policy? And
8 the way you'd normally see this in the industry is you have an
9 underwriting file for each account that you are underwriting
10 where there is an application. And then there's a record of
11 diligence. And in this case there are certain requirements
12 that are supposed to be in there that everybody were supposed
13 to have been gotten.

14 For example, a motor vehicle record for each of the
15 drivers. So our question is where are all these motor vehicle
16 records? And you would expect to see them in an underwriting
17 file on an account-by-account basis. Instead, what it looks
18 that they are now trying to do is just sort of produce a
19 mismatch of all of the files which if they give us the key to
20 what's what -- Bates number C to D is for this account, that's
21 fine. But I do have a concern we are going to hire an expert
22 who is going to want to look at these underwriting files and be
23 able to say, this new thing should be in here and it's not. So
24 I am going to need from them certainty on what they're claiming
25 the underwriting file is for each of these accounts.

15PAAAMTC

Conference

1 THE COURT: OK. Do you all want to respond to that?

2 MR. ZISSU: Well, your Honor, I'm a little confused by
3 counsel's position or concern given what they've given us is
4 essentially a large mishmash in no particular order. So we're
5 applying the same search tools. And we've given them the
6 meta-data and all the other things so they can run the same
7 searches as us. They have the same policy numbers and
8 submission numbers that we have. It's really a function of
9 them doing the same thing we're doing. And these documents are
10 already dated. They have a unique identifier. So producing
11 them by account with, by name if that's the way we want to
12 proceed, we can do that. We got 20 people that are working on
13 this and what gets done first gets produced on a rolling basis.
14 It's not an intention to shuffle the deck.

15 THE COURT: Is there some sort of key you can give
16 them to allow them to, as he said, reverse engineer and create
17 what the file was for a given policy?

18 MR. ZISSU: It's the same key that we're using to pull
19 the data together which is the KF&B A numbers and policy
20 numbers. We're dealing with a shuffled deck to begin with, so
21 they have the same hurdles that we do. We can produce that.
22 It'll take a lot more time than what they're doing right now.
23 This goes back to what Ms. Skala was going to get to currently
24 listing 310 random accounts. We're about a third of the way
25 through that and that's why we are looking for either an

15PAAAMTC

Conference

1 extension or some sort of limitation on the scope of what we
2 are doing. There is 2,433 accounts. Of those accounts, not
3 all of them are causing any damages to the plaintiff. This is
4 really broad --

5 THE COURT: It's not clear this dispute is ripe
6 because by the end of the letters I thought you would have
7 agreed --

8 Let me ask Mr. Simkin, do you agree there is 2,433 of
9 these --

10 MR. SIMKIN: There are 2,433 policies. There are 1500
11 or so policyholders, so I would view that as the account.

12 THE COURT: Is there any way to limit that so that we
13 could get this done sooner?

14 MR. SIMKIN: Well, we offered a long time ago to say
15 we will agree to do a sample, if you agree that the
16 non-produced documents are similar to the produced documents.
17 What I can't actually say is I am going to look at 150 of these
18 accounts and my expert is going to say there are problems with
19 these and they'll say the other 90 percent are perfect. That's
20 what I'm worried about. So I made that offer to them. They
21 didn't want to do that. They said instead we'd rather produce
22 all the files.

23 And frankly, if you go back and look at the contract
24 the underwriting files are my client's files. My client owns
25 them. They're in their possession. My client has a right to

15PAAAMTC

Conference

1 show up with no notice and review them. So the fact that it
2 takes them a year and a half to find those files, to give them
3 to us is in my mind indicative of a breach in and of itself.
4 It just shouldn't be this problematic to produced the
5 underwriting files.

6 THE COURT: But it's terabytes of data. That's the
7 problem.

8 MR. SIMKIN: Well, I don't know whether it is or is it
9 isn't but in any event --

10 THE COURT: Well, there's a chicken and egg problem in
11 that there's these master files. They're unfortunately stored
12 on tape because of the change in electronic storage and you
13 have, your clients have come forward and said there are all
14 these breaches but you are refusing to say it's these
15 policyholders that are the problem. So either it's going to be
16 a longer discovery period for you saying, look, why don't
17 you -- you've made these allegations, why don't you have
18 insight to where the problems are?

19 MR. SIMKIN: So we know which account was causing
20 losses. They had an obligation to get motor vehicle records
21 for each of those policy models. They didn't do that. They
22 underwrote that account in breach of the policy.

23 THE COURT: For all of them?

24 MR. SIMKIN: Yes. That was one of the --

25 THE COURT: They failed to do it for all of them?

15PAAAMTC

Conference

1 MR. SIMKIN: I don't know. Maybe they failed to do it
2 for one and maybe that company didn't happen to have an
3 accident. That doesn't mean that they weren't doing their job
4 in that the aggregate. The way insurance works is you try to
5 price it so the aggregate, you try to make a profit.

6 The other piece is if you look back at the contract
7 their obligation five years after termination is to give all
8 these files to us at their expense. So they sort of put them
9 in some format that they can't get back is a problem. But I
10 hear what you're saying about we've asked for a lot of stuff
11 and maybe it's organized in a way that maybe properly or not
12 it's going to take some time and we're willing to give some
13 time. I'm trying to be flexible. In my view 18 months is too
14 much time for document discovery but I appreciate what your
15 Honor is saying but there's some work to this.

16 THE COURT: But how did your clients realize there was
17 a problem? Was it with particular accounts or we didn't make
18 nearly as much money as we should?

19 MR. SIMKIN: I think there's a combination. I think
20 there were particular accounts that looked problematic. There
21 were the fact that the numbers weren't panning out the way they
22 thought they were going to and there were huge losses to the
23 program. And we allege in our complaint some of the examples
24 of the things we believed they did wrong but they're asking for
25 a list of every account that was breached. I can't do that

15PAAAMTC

Conference

1 before discovery is done.

2 THE COURT: If Mr. Simkin right that there is a right
3 of their clients to get access, I don't see how I could limit
4 them unless the parties agree to look at random samples. He is
5 right.

6 MS. SKALA: I don't know if that's in the context of
7 litigation it does say that within five years it hasn't been
8 five years. But in the context of this litigation they're
9 claiming \$20.4 million in damages which clearly had to come
10 from accounts that were not profitable and AmTrust knows which
11 accounts it's alleging were not profitable and we can start
12 there. AmTrust has contention that just because an account was
13 profitable doesn't mean that we didn't breach the agreement
14 ignores an essential element of its claims which is damages.

15 THE COURT: Right. But the damages we would have
16 profited a lot more.

17 MS. SKALA: The damages could mean we would have
18 profited a lot more. There are only \$20.4 million in the red.

19 THE COURT: You are not claiming any contracts where
20 you profited?

21 MR. SIMKIN: The 20.4 million number which has
22 increased since our complaint filing is the net number. So the
23 way it works is if there's an insurance policy that should have
24 been sold for \$100 but they sold it for \$50 and you do that
25 over many times, you are going to lose money on the program.

15PAAAMTC

Conference

1 Now you don't know which accounts necessarily are going to be
2 the ones that have the accidents that you pay out of but it's a
3 systemic issue.

4 THE COURT: But are you, is your universe of damages
5 limited to the accounts that lost money as opposed to those
6 that were profitable?

7 MR. SIMKIN: No. We were taking them all into
8 account.

9 THE COURT: OK. Well, this is going to be a little
10 unwieldy but I don't see a dispute that's teed up for me to
11 resolve on the issue of searches other than the specific search
12 item which is teed up which we will get to a minute.

13 Now, back to where I was. Item in dispute number one,
14 withheld documents, what's your complaint here?

15 MS. SKALA: They objected to producing documents.
16 This is more specific to the counterclaim requests from us and
17 the document pertaining to prior insurance program where
18 AmTrust refused to produce documents. They don't indicate
19 whether or not they are in possession of the documents or
20 they're just not producing them. They just object to it.

21 THE COURT: You don't say whether you have them or
22 not; is that the problem?

23 MS. SKALA: Yes.

24 THE COURT: Is this an issue only because of the
25 counterclaim that you are not producing on the counterclaim?

15PAAAMTC

Conference

1 MR. SIMKIN: To be honest, I have no idea. This is
2 not an issue we discussed. I'm really confounded with what it
3 is. We've spent months doing meet and confers. We're written
4 extensive correspondence trying to answer every question they
5 had. I'm not trying to hide any balls. I'm not sure which
6 request they think we're not being specific enough on. I'm
7 happy to try to clarify.

8 MS. SKALA: Specifically, the counterclaim request.
9 Mr. Simkin and I, with Mr. Zissu on the phone, have discussed
10 this before. It's specifically to counterclaim discovery that
11 I'm talking about. The objection from Mr. Simkin was that he
12 was not under an obligation to produce documents related to our
13 counterclaim because there was a motion to dismiss pending.
14 That was as far as the conversation got.

15 THE COURT: OK. You are going to have to produce
16 counterclaim discovery because I'm likely to deny the motion to
17 dismiss. So, I don't know what the issue is here. You are
18 going to have to respond here.

19 Search terms. Am I correct that the only dispute on
20 search terms is the one long search term that's in Kasowitz's
21 May 16 letter?

22 MR. ZISSU: Yes.

23 THE COURT: The one that is Black Car or Limousine or
24 taxi cab hand; that's the only dispute?

25 MS. SKALA: Yes.

15PAAAMTC

Conference

1 MR. ZISSU: With the generic term.

2 THE COURT: Right. With the asterisk. I think it's a
3 fair term and I'm going to require that a search term be
4 included with respect to the other 21.

5 You've agreed, right?

6 MR. ZISSU: Yes.

7 MS. SKALA: Yes, your Honor.

8 THE COURT: Document pertaining to prior insurance
9 program, this is document requests, several document requests
10 and interrogatory 20 from KF&B second demands pertaining to
11 AmTrust marketing solicitation, et cetera. The document
12 requests will not necessarily be produced but interrogatory 20
13 will be responded to.

14 Identification problematic accounts, we've talked
15 about this a little. There's a chicken and egg problem. I am
16 not going to require it at this time until perhaps the point of
17 contention interrogatories toward the end of discovery for them
18 to give you a list of problematic accounts.

19 With respect to request number 40 of the first
20 demands, KF&B sought documents related to the AmTrust internal
21 evaluation given risks prior for approving and or rejecting
22 proposal. And KF&B says AmTrust should be ordered to identify
23 which documents AmTrust used to approve or request to approve
24 or reject a proposed account.

25 Could you explain a little more what this is about?

15PAAAMTC

Conference

1 MS. SKALA: Sure. A lot of the accounts that were
2 written by KF&B were subject to AmTrust ultimate approval
3 before a quote could be issued before a policy could be issued.
4 So we're looking for documents that AmTrust used, generated,
5 relied upon in determining whether or not to approve or reject
6 a given risk under that authority.

7 THE COURT: What's the objection?

8 MR. SIMKIN: That's fine, your Honor. Request 40 we
9 wrote to them in November 2017 saying we're not sure what
10 you're asking for as written, seems to be asking that every
11 document and every claim file. If you tell us what you want
12 that's not covered by your other requests, we're happy to give
13 it to you. And they wrote back and the first we heard of it
14 was in that May letter. This was the November 17 letter.

15 THE COURT: Insofar as documents indicating basis for
16 approving or rejecting a proposed account, you can produce it
17 based on that understanding?

18 MR. SIMKIN: Yes. The back and forth between them
19 where they may -- underwriting guidelines for an account and we
20 evaluate it and give them an account. We're happy to produce
21 that.

22 THE COURT: OK. With respect to -- I think we'll do
23 the deadline last because that's the trickiest. With respect
24 to the documents concerning KF&B' -- no. I'm on Kasowitz
25 letter from May 9 which identifies separate disputes, first is

15PAAAMTC

Conference

1 KF&B's November 2014 sale to Acrisure.

2 MS. SKALA: Yes.

3 THE COURT: This is denied. The idea, the motive on a
4 breach of contract case is relevant is a real stretch.

5 MR. SIMKIN: What about with respect to damages, your
6 Honor?

7 THE COURT: How do you get damages from the document
8 relating to a transaction in which their assets were sold?

9 MR. SIMKIN: Sure. I am happy to. What we believe
10 happened, so we paid during the four years of the program, we
11 paid KF&B approximately a million dollars. Now, if they sold
12 themselves on a basis that was tied to the amount of sales,
13 their commissions and they say they sold them -- or ten times
14 sales and they earned, that turned 18 million into \$180
15 million, then that is a potential avenue for damages which they
16 don't dispute. All they say is that we would have to wait
17 until we've proved liability in order to get damages and
18 discovery. But they've never made a request to bifurcate
19 liable and damages. This wouldn't be an appropriate one to
20 prove our damages at trial and the amount that they may have
21 profited from their misconduct I think is relevant.

22 THE COURT: What exactly is this category of documents
23 you are seeking.

24 MR. SIMKIN: The contract document and document
25 sufficient to show the economic terms of the deal which I think

15PAAAMTC

Conference

1 are just the contract documents the agreements. There's a side
2 agreement.

3 THE COURT: So you want the agreement?

4 MR. SIMKIN: Yeah. And if it's multiple agreements,
5 then the integrated family of agreements.

6 THE COURT: I know you were seeking a bunch of stuff
7 about the representation and the warranty and I guess that's in
8 the agreement.

9 MR. SIMKIN: I would have liked some of the
10 communication back and forth about our program. But I agree,
11 that's not relevant to damages. That would be relevant to
12 liability but with respect to the damages, I think that all we
13 would need is the agreement.

14 THE COURT: What do you say to that, Ms. Skala?

15 MS. SKALA: The agreement itself, I don't believe,
16 contains the economic terms that he is seeking. And he is not
17 entitled to discouragement of profits to the extent that that
18 is what this is because he hasn't proved his case as breach of
19 fiduciary duty and I don't know if it qualifies as
20 discouragement.

21 THE COURT: We haven't bifurcated discovery. We're
22 doing damages and liability discovery all together. You've
23 signed a protective order I assume. So this could be
24 confidential. Could be "attorneys' eyes only".

25 MS. SKALA: I don't think that he's established

15PAAAMTC

Conference

1 relevance or entitled to. It's a fishing expeditious.

2 THE COURT: He's laid out a theory that this would be
3 damages for breach of fiduciary duty to the extent that they
4 profited off the breaches of their duty in connection with
5 the --

6 MS. SKALA: -- theory can be somehow offered for the
7 premium which it didn't have authority to increase its
8 commissions because it needed -- bias. So balanced the theory
9 of AmTrust to sort of put forthwith absolutely no support.
10 They somehow -- for us to think that there a shred of
11 credibility to that theory.

12 THE COURT: I agree. I am going to deny the request.
13 Second is KF&B's communications with Old Republic
14 concerning the program. So Old Republic was the entity that
15 KF&B worked with following the termination.

16 Is that right?

17 MS. SKALA: Their current business partner, yes.

18 THE COURT: And what's the theory or relevance of
19 those documents?

20 MR. SIMKIN: So two theories, your Honor. First, I
21 mean, so we've sent the subpoena to Old Republic and they've
22 produced a small number of documents back. Among the documents
23 we've gotten we've seen e-mails where these people have told
24 Old Republic this account should be priced at double. They
25 should charge premiums which total and consistent with our

15PAAAMTC

Conference

1 theory with what KF&B was doing and Ms. Skala said KF&B didn't
2 have authority to set premium rates.

3 The second point is KF&B has told the store in this
4 case that the losses on the program are due to systemic issues
5 in the industry that were beyond their control and not due to
6 any sort of incompetents or malfeasance on their end. And when
7 they take this program and shop it at Old Republic I think it's
8 plausible they are going to be saying a different story because
9 they're not going to go to Old Republic and say they're all
10 systemic issues -- and so we think that what they said about us
11 and what they said about our program when they went to Old
12 Republic to shop this program around we think that's --

13 THE COURT: Ms. Skala.

14 MS. SKALA: So with respect to the charging of double
15 premiums I'm going to best to do -- the account I believe that
16 he's referring to, I know which account it is. It's ASC and he
17 takes out of context the e-mail is that he is talking about, I
18 saw the e-mail. KF&B did not have the authority to arbitrarily
19 charge premiums. Premium number was generated using
20 development factors that AmTrust actuaries created and used
21 with ISO rates to determine what the premium could be. There
22 was a limited discretion that KF&B had but attached five
23 percent of what the premium that was generated by AmTrust
24 actuaries using AmTrust's own -- in each state that it filed
25 insurance policies with. And that was where KF&B got the

15PAAAMTC

Conference

1 premium.

2 Now each insurance company in the industry has its own
3 lost cause multiplier that it develops with actuaries that it
4 files within each state. Each state that uses ISO factors
5 apply to those. It changes them on a yearly basis. California
6 where this account is, where this e-mail is that Mr. Simkin is
7 referring to from Old Republic is one where you if you want to
8 adopt the new factors that are developed by ISO in that state,
9 you have to apply for it and AmTrust didn't and Old Republic
10 did. So they could charge a higher premium and AmTrust
11 couldn't.

12 THE COURT: OK. Do you have a different theory of
13 that?

14 MR. SIMKIN: Look, they may have defenses or
15 explanations for a lot of these inconsistencies but that's not
16 a question of whether we're entitled to get the documents and
17 then explore our theories. What I can tell you about KF&B's
18 involvement in rate setting seems to have become relevant. So,
19 yes, there's been an algorithm that KF&B controlled a number of
20 the inputs that go into the algorithms and some of those inputs
21 are supposed to be objective and some of them are subjective.

22 For example, if you put into the account owns one
23 thousand vehicles, you'll get a cheaper price than if the
24 account owns two thousand. There are also subjective factors
25 that you could put in. Do they have a secure garage? So KF&B

15PAAAMTC

Conference

1 had the ability to effectively manipulate the price of the
2 insurance that was sold. And so I don't think you can say
3 categorically it's irrelevant when they took the program to
4 someone else and the rate we were charging with AmTrust were
5 way too low.

6 MS. SKALA: Mr. Simkin is seeking documents from his
7 direct competitors, AmTrust's direct competitors by seeking
8 these documents with Old Republic and has to provide an
9 adequate representation other than a conspiracy theory as to
10 why he is entitled to them.

11 THE COURT: What about the idea that there might have
12 been representations by KF&B and Old Republican about the
13 performance of the program that do undermine what KF&B is
14 arguing in this case?

15 MS. SKALA: I think that Mr. Simkin overgeneralized
16 and misrepresented what KF&B's entire defense is in this case
17 that is solely the market factors. It's also the fact that
18 AmTrust had a lot of control over this program is lot of what
19 KF&B did was -- a lot of numbers that KF&B used were developed
20 by AmTrust's actuaries. And so by just the blanket statement
21 that was market factors is not a whole picture. I also don't
22 see what KF&B told Old Republican assuming Mr. Simkin is right
23 and KF&B told Old Republican that the program was not profiting
24 because of market factors, I don't see how that changes how the
25 program was actually profiting. It's not relevant.

15PAAAMTC

Conference

1 THE COURT: I ultimately agree. I think it's not
2 really tangential to the breach of contract claims in this case
3 and I am not going to require them to produce it.

4 Documents concerning prior insurers is the third
5 category. And this I assume is prior relationships that KF&B
6 had. And for the same reasons I think that that's tangential
7 and I'm not going to require that to be produced.

8 MR. SIMKIN: Your Honor, could I explain one reason
9 why it's different?

10 THE COURT: Yes.

11 MR. SIMKIN: So as I was explaining to your Honor, one
12 of KF&B's ability to control premium prices was with these
13 inputs they would put into the algorithm. One of the largest
14 inputs is the taxi company's prior loss experience. So if KF&B
15 put into the algorithm the taxi company "X" had very few losses
16 over the past four years, then if you put in KF&B's, the taxi
17 company "X" has lost experience as high and we believe that if
18 you get the actual loss experience or some of these taxi
19 programs, that may show that what was input was not accurate.
20 That is why we're trying to get some information about these
21 prior insurers that I think was categorically different to the
22 theory of relevance than and with respect to the subsequent
23 insures because obviously nothing that happened after our
24 program directly impacted what happened in our program. But
25 the information that happened before our program, KF&B was

15PAAAMTC

Conference

1 supposed to use that as part of our program. And so I think
2 that the theory of relevance is a little different and a little
3 bit more direct and concrete.

4 THE COURT: Ms. Skala, would you like to respond?

5 MS. SKALA: Yes. I was having trouble following what
6 he was saying.

7 Are you --

8 THE COURT: Please address the Court.

9 MS. SKALA: OK. The claim for a breach of contract
10 and what Mr. Simkin seems to be indicating is that he was
11 claiming that KF&B intentionally misfed information into the
12 programs to change what the lost funds would be. And he has
13 not plead that anywhere. So I don't see how that could be
14 relevant to the dispute. The loss funds were something that
15 were generated by those areas. They were input into KF&B's
16 spreadsheet and the number was put out. I don't see how what
17 those numbers were are relevant to AmTrust's now claimed
18 damages.

19 THE COURT: Do you want to clarify?

20 MR. SIMKIN: So part of our theory is KF&B is
21 essentially a broker. Then it gets paid a commission. So it
22 has an incentive to sell, sell, sell. So it's easier to sell
23 insurance at a cheaper price. KF&B has this incentive to try
24 to lower the price of insurance to increase the number sales
25 and increase its commission as profits. We allege they did

15PAAAMTC

Conference

1 that improperly to our detriment in a breach of our fiduciary
2 duties.

3 One of the ways we believe that they were able to
4 artificially inflate the price of insurance was through fudging
5 the inputs that go into algorithms. One of biggest drivers of
6 those inputs is the actual lost experience of the taxi company
7 that you are plugging into the algorithm. What we're trying to
8 do is get the information to compare what was the actual loss
9 experience with the information they plugged into the system.

10 THE COURT: Do you understand?

11 MS. SKALA: Yeah, I do. Part of the underwriting
12 guidelines, one of the requirements that when we underwrote a
13 company for AmTrust we were supposed to supply loss for the
14 prior three to five years. So AmTrust will have that
15 information and that's what we're looking for. They're looking
16 for a prior insured lost runs that were generated from prior
17 insurance companies.

18 THE COURT: So that's your --

19 MS. SKALA: They don't need our communication in a way
20 that the program was operated with the prior insureds. They
21 will have it.

22 THE COURT: OK. With respect to the communications
23 with the prior insurance, I don't see how that's relevant.

24 MR. SIMKIN: We are getting loss runs with respect to
25 the prior carriers.

15PAAAMTC

Conference

1 MS. SKALA: To the extent that the lost runs, exist
2 and are in the files --

3 MR. ZISSU: If I might? It's not the lost runs that
4 are submitted to the prior insurance carriers that KF&B worked
5 with. What would be provided to AmTrust as part of its
6 underwriting file are the three year lost runs or whatever the
7 case may be for that individual taxi account which might come
8 from KF&B's prior business partners or other insurers that KF&B
9 does do business with but are considered the lost runs as lost
10 history to then judge whether this would be a good risk. And
11 those are going to be provided to AmTrust for the accounts
12 written with AmTrust.

13 MR. SIMKIN: I think that's the problem. What we're
14 trying to do is compare what they told us with what the reality
15 was before. So, if they're saying all I'm giving you is what I
16 told you, that didn't allow us to do the comparison to figure
17 out whether if what they told us is true or not.

18 MS. SKALA: I don't understand what Mr. Simkin is
19 asking for. The lost runs that are generated are -- let's say
20 it's Serena's taxi. And now Serena's taxi is now applying to
21 AmTrust and has a lost run whether can be the MGA or not, it
22 doesn't matter going to be lost runs or prior carriers and they
23 are going to get them.

24 THE COURT: Do you have some reason to believe that
25 the lost runs with respect to prior carriers are different?

15PAAAMTC

Conference

1 Some of the prior carriers are different information?

2 MR. SIMKIN: Yes.

3 THE COURT: Why don't you subpoena the prior carriers?

4 MR. SIMKIN: We have.

5 MS. SKALA: No.

6 THE COURT: So you'll get them now?

7 MR. SIMKIN: They've made burden objection and this
8 was a long time ago. So a lot of areas -- well, I don't
9 have -- I don't still have a lot of this stuff. So I'd like to
10 be able to fill in the gaps. If they don't have it, they don't
11 have it. But if they do, I think it's relevant.

12 THE COURT: So are you basically looking for not some
13 targeted piece of information. You are looking for a claims
14 file for prior carriers.

15 MR. SIMKIN: No, not claims file. The claims files
16 would be each piece of paper on an individual claim. A lost
17 run -- that this carrier or taxi company had or during that
18 year period or whatever it is. It would be a summary
19 spreadsheet.

20 THE COURT: Are you folks you really on the lost runs?

21 MR. SIMKIN: Yes.

22 THE COURT: So you are looking for communications with
23 prior carriers relating to lost runs?

24 MR. SIMKIN: Correct.

25 THE COURT: Do you know if you have that?

15PAAAMTC

Conference

1 MS. SKALA: I think it's overbroad because I don't
2 think the insurance in prior carriers overlap and were actually
3 insured that were for AmTrust's program. May have been a
4 company that's left the program and were not relevant to this
5 case.

6 And secondly, if there are overlaps from insureds from
7 recent prior areas, the lost runs would be in the underwriting
8 files whether or not KF&B was the manager or not.

9 MR. SIMKIN: We would be happy to limit it to insureds
10 that overlap the prior program.

11 THE COURT: I'm going to ask you to reconfer about
12 this particular issue and if there is a narrowing that you can
13 focus on communications generally or about termination of
14 relationship solely on the lost run information, lost run
15 experience in the overlapping prior program. See if you can
16 reach an agreement on that.

17 And then the last issue I think is the date for
18 production. Plaintiffs respectfully propose June as a
19 reasonable deadline for document production. Defendants
20 respectfully proposed end of 2018 for document production.

21 MS. SKALA: Yes.

22 THE COURT: What I think what I am going to do is
23 extend document production to the end of August. That gives
24 you two months with 20 diligent contract attorneys. Hopefully,
25 you can get through it. I think that means I'm going to have

15PAAAMTC

Conference

1 to extend the fact deadline. You want to do depositions after
2 the production, I assume?

3 MR. SIMKIN: Yes.

4 THE COURT: What's the current fact discovery
5 deadline?

6 MR. WEISER: August 31, 2018.

7 THE COURT: So, I'm going to make August 31 the
8 deadline for a document production.

9 And then how many depositions are y'all planning to
10 take?

11 Why do you laugh?

12 MS. SKALA: A lot.

13 MR. SIMKIN: I think there could be quite a few.
14 There are a number of names that are identified as having --

15 THE COURT: Could you do it in a month or two months?

16 MR. SIMKIN: What I'm happy to do is -- having your
17 Honor's guidance for fact discovery -- meet with my colleagues
18 and submit a joint letter.

19 THE COURT: You're getting along OK, right?

20 MS. SKALA: For the most part, yes.

21 THE COURT: You are not hitting on each other?

22 MR. SIMKIN: I don't think so.

23 THE COURT: Given that I'm moving the document
24 production deadline to August 31, if you'd confer and scheduled
25 a couple months for deposition therein pushing out the expert

15PAAAMTC

Conference

1 period after that.

2 MR. SIMKIN: Does the August 31 deadline include the
3 deadline for privilege logs?

4 THE COURT: Can you do that?

5 MS. SKALA: More time would definitely be helpful in
6 that regard.

7 THE COURT: Can you guys do that?

8 MR. SIMKIN: I would like it to be done then because
9 if we're going to have a dispute on privilege logs, then we
10 need to resolve that before depositions.

11 THE COURT: Privilege logs on August 31, as well.

12 MR. ZISSU: Your Honor, the 20 attorneys are both a
13 mixture of permanent staff and temporary. So there is not an
14 army of attorneys solely dedicated to this.

15 THE COURT: Nice use of "dedicated".

16 MR. ZISSU: Thank you, your Honor.

17 THE COURT: All right. I may quote that. So if you
18 would submit a proposed schedule within a week or two, this
19 would be great and then I'll sign that. I don't think I am
20 going to set a date for now on the next conference. I think
21 I'll wait or do you want me to do it now? Do you have your
22 phones?

23 MS. SKALA: No.

24 THE COURT: I'll send it after I get your proposed
25 schedule.

15PAAAMTC

Conference

1 Last thing I want to talk about is settlement. I
2 remember in this case things were kind of on hold for a little
3 while through December of last year I think when there were
4 settlement discussions. Am I right about that?

5 You've a got to say yes or no for the court reporter.

6 MS. SKALA: Yes.

7 THE COURT: Can we go off the record to talk about
8 settlement?

9 (Discussion held)

10 THE COURT: For purposes of the record, counsel, we
11 are adjourned.

12 (Adjourned)

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